

HOUSE BILL NO. 794

INTRODUCED BY D. GALLIK

A BILL FOR AN ACT ENTITLED: "AN ACT CREATING CRIMINAL AND CIVIL PENALTIES FOR VIOLATIONS BY PUBLIC OFFICERS OF THE RIGHT TO KNOW AS SET FORTH IN ARTICLE II, SECTION 9, OF THE MONTANA CONSTITUTION; PROVIDING DEFINITIONS; PROVIDING THAT THE EMPLOYING GOVERNMENTAL ENTITY IS NOT REQUIRED TO DEFEND OR INDEMNIFY AN EMPLOYEE VIOLATING THE PUBLIC RIGHT TO KNOW; REVISING ACTIONS IN WHICH A PLAINTIFF MAY RECOVER; MAKING AN AWARD OF ATTORNEY FEES MANDATORY; AND AMENDING SECTIONS 2-3-221, 2-9-305, AND 45-7-401, MCA."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

NEW SECTION. Section 1. Purpose. The purpose of [sections 1 through 4] is to create a penalty for violations of Article II, section 9, of the Montana constitution, granting to the citizens of Montana the fundamental right to examine the documents of public bodies and agencies. By this legislation, the legislature does not intend to limit awards of civil damages for violations of Article II, section 9, to awards of attorney fees or the voiding of a public body's decision.

NEW SECTION. Section 2. Definitions. As used in [sections 1 through 4], the following definitions apply:

- (1) "Public" means any individual or entity.
- (2) "Public document" means:
 - (a) a public writing as defined in 2-6-101(2) and (3);
 - (b) a public record as defined in 2-6-401(2)(a) or (2)(b); or
 - (c) any other paper, correspondence, form, book, photograph, microfilm, magnetic tape, computer storage media, map, drawing, or other type of document that has been generated for or by a government agency in which an individual right to privacy does not clearly exceed the public's right to know.
- (3) "Public officer" has the meaning provided in 2-2-102.
- (4) "Records custodian" means any public officer responsible for the custody, storage, filing,

safekeeping, and management of public documents.

(5) "Right to know" means the fundamental right afforded to the public by Article II, section 9, of the Montana constitution.

NEW SECTION. Section 3. Violation of public's right to know -- exception. (1) A records custodian who, when faced with a request for a public document from a member of the public, purposely or knowingly withholds those public documents from the member of the public is guilty of a violation of [sections 1 through 4] and, upon conviction, shall be punished as set forth in [section 4] and 45-7-401.

(2) As used in this section "purposely" and "knowingly" have the meaning provided in 45-2-101.

NEW SECTION. Section 4. Damages. (1) A records custodian found guilty of violating Article II, section 9, of the Montana constitution or [section 3], in addition to any other penalties or fines assessed, shall pay damages of not less than \$1,000 for the first offense, \$3,000 for the second offense, and \$5,000 for the third and subsequent offenses.

(2) If a records custodian has violated the public's right to know, then the records custodian is considered to have acted outside the course and scope of the records custodian's employment and may not be defended or indemnified by the government, the employer, or its insurers for any money judgment or legal expenses, including attorney fees, pursuant to 2-9-305(6).

Section 5. Section 2-3-221, MCA, is amended to read:

"2-3-221. Costs to plaintiff in ~~certain~~ actions to enforce constitutional right to know. A plaintiff who prevails in an action brought in district court to enforce ~~his~~ the plaintiff's rights under Article II, section 8 or 9, of the Montana constitution ~~may~~ must be awarded ~~his~~ the plaintiff's costs and reasonable attorneys' fees."

Section 6. Section 2-9-305, MCA, is amended to read:

"2-9-305. Immunization, defense, and indemnification of employees. (1) It is the purpose of this section to provide for the immunization, defense, and indemnification of public officers and employees civilly sued for their actions taken within the course and scope of their employment.

(2) In any noncriminal action brought against any employee of a state, county, city, town, or other governmental entity for a negligent act, error, or omission, including alleged violations of civil rights pursuant to

42 U.S.C. 1983, or other actionable conduct of the employee committed while acting within the course and scope of the employee's office or employment, the governmental entity employer, except as provided in subsection (6), shall defend the action on behalf of the employee and indemnify the employee.

(3) Upon receiving service of a summons and complaint in a noncriminal action against ~~him~~ an employee, the employee shall give written notice to ~~his~~ the employee's supervisor requesting that a defense to the action be provided by the governmental entity employer. If the employee is an elected state official or other employee having no supervisor, the employee shall give notice of the action to the legal officer or agency of the governmental entity defending the entity in legal actions of that type. Except as provided in subsection (6), the employer shall offer a defense to the action on behalf of the employee. The defense may consist of a defense provided directly by the employer. The employer shall notify the employee, within 15 days after receipt of notice, whether a direct defense will be provided. If the employer refuses or is unable to provide a direct defense, the defendant employee may retain other counsel. Except as provided in subsection (6), the employer shall pay all expenses relating to the retained defense and pay any judgment for damages entered in the action that may be otherwise payable under this section.

(4) In any noncriminal action in which a governmental entity employee is a party defendant, the employee ~~shall~~ must be indemnified by the employer for any money judgments or legal expenses, including attorney fees either incurred by the employee or awarded to the claimant, or both, to which the employee may be subject as a result of the suit unless the employee's conduct falls within the exclusions provided in subsection (6).

(5) Recovery against a governmental entity under the provisions of parts 1 through 3 of this chapter constitutes a complete bar to any action or recovery of damages by the claimant, by reason of the same subject matter, against the employee whose negligence or wrongful act, error, or omission or other actionable conduct gave rise to the claim. In any ~~such~~ action against a governmental entity under parts 1 through 3 of this chapter, the employee whose conduct gave rise to the suit is immune from liability by reasons of the same subject matter if the governmental entity acknowledges or is bound by a judicial determination that the conduct upon which the claim is brought arises out of the course and scope of the employee's employment, unless the claim constitutes an exclusion provided in subsections (6)(b) through (d) of subsection (6) (6)(e).

(6) In a noncriminal action in which a governmental entity employee is a party defendant, the employee may not be defended or indemnified by the employer for any money judgments or legal expenses, including attorney fees, to which the employee may be subject as a result of the suit if a judicial determination is made

1 that:

2 (a) the conduct upon which the claim is based constitutes oppression, fraud, or malice; or for any other
3 reason does not arise out of the course and scope of the employee's employment;

4 (b) pursuant to [sections 1 through 4], the conduct is a violation of the right to know;

5 ~~(b)(c)~~ the conduct of the employee constitutes a criminal offense as defined in Title 45, chapters 4
6 through 7;

7 ~~(e)(d)~~ the employee compromised or settled the claim without the consent of the government entity
8 employer; or

9 ~~(d)(e)~~ the employee failed or refused to cooperate reasonably in the defense of the case.

10 (7) If ~~no~~ a judicial determination has not been made applying the exclusions provided in subsection (6),
11 the governmental entity employer may determine whether those exclusions apply. However, if there is a dispute
12 as to whether the exclusions of subsection (6) apply and the governmental entity employer concludes it should
13 clarify its obligation to the employee arising under this section by commencing a declaratory judgment action
14 or other legal action, the employer is obligated to provide a defense or assume the cost of the defense of the
15 employee until a final judgment is rendered in ~~such~~ the declaratory judgment action holding that the employer
16 ~~had no~~ did not have an obligation to defend the employee. The governmental entity employer ~~has no~~ does not
17 have an obligation to provide a defense to the employee in a declaratory judgment action or other legal action
18 brought against the employee by the employer under this subsection."

19
20 **Section 7.** Section 45-7-401, MCA, is amended to read:

21 **"45-7-401. Official misconduct.** (1) A public servant commits the offense of official misconduct when
22 in his an official capacity ~~he the public servant~~ commits any of the following acts:

23 (a) purposely or negligently fails to perform any mandatory duty as required by law or by a court of
24 competent jurisdiction;

25 (b) knowingly performs an act in his an official capacity ~~which he~~ that the public servant knows is
26 forbidden by law;

27 (c) with the purpose to obtain a personal advantage or an advantage for himself or another, performs
28 an act in excess of his the public servant's lawful authority;

29 (d) solicits or knowingly accepts for the performance of any act a fee or reward which ~~he the public~~
30 servant knows is not authorized by law; or

(e) knowingly conducts a meeting of a public agency in violation of ~~2-3-203~~ Title 2, chapter 3, part 2;

or

(f) knowingly withholds a public document from a member of the public in violation of [sections 1 through

4].

(2) A public servant convicted of the offense of official misconduct shall be fined not to exceed \$500,
~~or~~ be imprisoned in the county jail for a term not to exceed 6 months, or both.

(3) The district court ~~shall have~~ has exclusive jurisdiction in prosecutions under this section. Any action
for official misconduct must be commenced by an information filed after leave to file has been granted by the
district court or after a grand jury indictment has been found.

(4) A public servant who has been charged as provided in subsection (3) may be suspended from ~~his~~
office without pay pending final judgment. Upon final judgment of conviction, ~~he~~ the public servant shall
permanently forfeit ~~his~~ the public servant's office. Upon acquittal, ~~he shall~~ the public servant must be reinstated
in ~~his~~ the office and ~~shall~~ must receive all backpay.

(5) This section does not affect any power conferred by law to impeach or remove any public servant
or any proceeding authorized by law to carry into effect ~~such~~ the impeachment or removal."

NEW SECTION. Section 8. Codification instruction. [Sections 1 through 4] are intended to be
codified as an integral part of Title 2, chapter 3, and the provisions of Title 2, chapter 3, apply to [sections 1
through 4].

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